

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 46/2018
[2018] NZSC 66

BETWEEN PHILIP CLAUDE TARR
Applicant

AND DOUGLAS JOHN SUTCLIFFE
First Respondent

AND TERENCE SUTCLIFFE AND
BRADEN MATSON AS PARTNERS OF
FROST & SUTCLIFFE LAWYERS
Second Respondent

Court: William Young, Glazebrook and Ellen France JJ

Counsel: P C Creagh and I B Kwan-Parsons for Applicant
P J L Hunt and J Heard for Respondents

Judgment: 31 July 2018

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B Costs of \$2,500 are awarded to the respondents.**
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REASONS

Background

[1] Mr and Mrs Tarr married on 31 March 1979 and separated on 13 April 1993. Their relationship property issues were only decided in 2013, coming before the Court some 20 years after separation.¹

¹ *Tarr v Tarr* [2013] NZFC 8921 (Judge de Jong) [Family Court judgment] at [1].

[2] During their marriage, Mr and Mrs Tarr purchased three properties funded by bank loans. It was common ground that these properties were relationship property.

[3] Some three years after separation Mrs Tarr wished to purchase another property, to be totally financed by the Bank of New Zealand. The bank required this property to be purchased jointly and each party to sign personal guarantees secured over all properties owned by Mr and Mrs Tarr.

[4] A company, Great Empire Ltd (GEL), was formed to purchase the property and each party was issued with an equal number of shares. The purchase was completed and the loan drawn down on 27 February 1996. The next day the parties signed a share transfer (Mr Tarr as transferor and Mrs Tarr as transferee) said to be pursuant to a declaration of trust. There was no separate declaration of trust. The share transfer was not registered until October 2010.

[5] In the Family Court, it was held that the shares in GEL held by Mr Tarr were always meant to be held on trust for Mrs Tarr and were not relationship property.² That decision was upheld by the High Court.³

[6] The allegation by Mr Tarr that he had signed a blank share transfer on 28 February 1996 which had later been filled out was rejected by both Courts.⁴ That the share transfer was part of some “pre-nup/contracting out” transaction was also rejected by the Family Court.⁵

[7] In 2016 Mr Tarr issued proceedings against the respondents,⁶ alleging that Mr Sutcliffe exerted undue influence on Mr Tarr to sign a blank share transfer used to deprive Mr Tarr of beneficial ownership of half of the shares in GEL. Alternatively, it was alleged that there was a breach of fiduciary duty which again allegedly deprived

² At [26]–[28].

³ *Tarr v Tarr* [2014] NZHC 1450 (Thomas J) [High Court appeal judgment] at [27]–[35].

⁴ Family Court judgment, above n 1, at [28(d)]; and High Court appeal judgment, above n 3, at [33].

⁵ At [28(e)].

⁶ He subsequently discontinued the proceedings against the second respondents, the partners of Frost & Sutcliffe Lawyers. Initially these proceedings were also against Mrs Tarr alleging fraud but were discontinued against her too.

Mr Tarr of beneficial ownership of a half share in GEL. It is maintained that Mr Tarr believed the share transfer was so that the shares could be transferred to a family trust.

[8] The respondents applied for summary judgment against Mr Tarr or that the claim be struck out claiming:

- (a) the defence of laches applies; and
- (b) abuse of process or that the claim is barred by issue estoppel.

[9] The application was unsuccessful in the High Court⁷ but the respondents' appeal was allowed by the Court of Appeal.⁸ The Court of Appeal held that the claim was an abuse of process in that it would require a challenge to the findings of the Family Court and the High Court that Mr Tarr never had a beneficial interest in the GEL shares. Mr Tarr now seeks leave to appeal to this Court against the decision of the Court of Appeal.

Our assessment

[10] The current statement of claim relies on the proposition that Mr Tarr was a beneficial owner of half of the shares in GEL and that the actions of Mr Sutcliffe wrongfully deprived him of this. This means that the Court of Appeal was correct to hold that the claim would be an abuse of process and the application for leave to appeal must be dismissed.

[11] In his application for leave to appeal Mr Tarr puts forward an argument that he says does not depend on his having had beneficial ownership of the shares. We make no comment on that argument. It is not the basis of the current statement of claim and does not appear to have been advanced in the Courts below. In these circumstances, it would not be appropriate for us to address this argument therefore on a second appeal.

⁷ *Tarr v Sutcliffe* [2017] NZHC 547 (Associate Judge Christiansen).

⁸ *Sutcliffe v Tarr* [2018] NZCA 135, [2018] NZAR 696 (Asher, Brewer and Collins JJ).

Result and costs

[12] The application for leave to appeal is dismissed.

[13] Costs of \$2,500 are awarded to the respondents.

Solicitors:

Anderson Creagh Lai Limited, Auckland for Applicant

McElroys, Auckland for Respondents